



SENT VIA EMAIL

January 14, 2013

Delta Stewardship Council
980 9th Street, Suite 1500
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recirculateddpeircomments@deltacouncil.ca.gov

Re: Recirculated Draft EIR

Dear Council Members:

The San Joaquin Tributaries Authority and its members¹ ("SJTA") have completed review of the Delta Stewardship Council's ("DSC") recirculated Draft Programmatic Environmental Impact Report ("R-DPEIR"). The SJTA finds that several analytical and descriptive deficiencies remain from the Draft Programmatic Environmental Impact Statement ("DPEIR") and therefore incorporate and attach the written comments provided from the San Joaquin River Group Authority on February 2, 2012. For the reasons set forth below, the SJTA recommends that the DSC **not** certify the DPEIR or the R-DPEIR until the deficiencies which render it unable to survive judicial review are remedied.

A. *The "Delta Plan" is the project.*

The DSC released the Fifth Staff Draft of the Delta Plan in August 2011. This became the "Proposed Project" for purposes of the DPEIR. Since the DPEIR was released and the comment period closed, several significant revisions to the Proposed Project occurred, culminating in the Final Draft Delta Plan, released in November 2012 ("Revised Project"). The R-DPEIR characterizes itself as an additional "volume" and treats the Revised Project as a separate alternative to the Proposed Project.

The Revised Project is not an alternative to the Proposed Project, it is the Proposed Project. Characterizing the Final Delta Plan as an "alternative" is incorrect. The Delta Plan has been a single

¹ Members of the San Joaquin Tributaries Authority include the City and County of San Francisco, Merced Irrigation District, Modesto Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, and Turlock Irrigation District.

project developed over several months and no other draft form of the Delta Plan is considered as an Alternative. This is clearly an attempt to side-step the proper process to revise the DPEIR and indicates a lack of disclosure and public transparency.

The R-DPEIR states that it was recirculated pursuant to California Code of Regulations, Title 14, section 15088.5, which requires recirculation when there is “significant new information.” It goes on to state that only the revised chapters or portions of an environmental impact report (“EIR”) (in this case, DPEIR) need to be recirculated. Nowhere in the regulations or statutory code authorizes the same project to be presented as an alternative. Indeed, “recirculate” by definition would suggest that something is being re-released. In this case, this is an entirely new “volume” which does not revise any chapters or portions of the DPEIR. The DSC is obligated to conduct environmental review of its project in a thorough manner to allow the public to understand potential impacts; the hasty manner in which the R-DPEIR was completed does not remedy deficiencies or revise the DPEIR. The SJTA therefore requests that the DSC forego adopting the R-DPEIR and insist that a proper recirculated DPEIR is prepared and released, accurately analyzing impacts resulting from the Revised Project and proposed mitigation measures.

B. Project analyses remain inadequate, precluding meaningful public review.

The statutory goal of an EIR is to provide the public with information and meaningful analysis of alternatives about a proposed project that will enable it to understand evaluate and respond. (*Laurel Heights Improvement Ass’n v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 403 – 404.) Recirculation is required when a draft EIR is so inadequate and conclusory in nature that meaningful public review and comment were precluded. (Cal. Code Regs., tit. 14 § 15088.5(a)(4).) Such should have been the case here.

For instance, the R-DPEIR’s use of “natural flow” remains undefined, while the Revised Project appears to shift toward using “functional flow.” At minimum, this change should have been addressed in the R-DPEIR and substituted in the DPEIR. Until meaningful analysis allowing for informed public participation occurs, the DPEIR and R-DPEIR fall short of legal accuracy.

a. Water Supply Reliability

The R-DPEIR states that the “Revised Project would apply to areas of the Delta watershed located upstream of the Delta unlike the Proposed Project.” (R-DPEIR, at 3-2.) Several problems stem from this statement. First, the DSC has no authority to regulate outside of the Delta. (Water Code, § 85302(b).) Therefore, the Revised Project *cannot* apply to areas located upstream.

Next, the R-DPEIR states in conclusory fashion that many impacts related to reliable water supply projects under the Revised Project would be greater than under the Proposed Project because of the newly-covered upstream area. Like the DPEIR, these statements entirely lack analyses. The R-DPEIR does not identify where the impacts are expected to occur other than the overly broad “upstream” description, how long those impacts will last, what types of impacts are expected to occur, or any other descriptive analysis. This falls significantly short of the CEQA standard which requires an EIR to provide the public with information and meaningful analysis of alternatives.

b. Ecosystem Restoration Policy 1

One purpose of recirculating EIR's is to inform the public of significant new information. The Final Draft Delta Plan Ecosystem Restoration Policy 1 mandates the State Water Board to develop, implement and enforce new and updated flow objectives for the Delta and high priority tributaries. Accordingly, the State Water Board has been undertaking the development of updated flow objectives for the past several months and has identified a phased approach to the revision of flow objectives, beginning with the San Joaquin River watershed. Related to these efforts, the State Water Board released its substitute environmental document ("SED") identifying environmental and economic impacts in accordance with its duties pursuant to CEQA. The impacts identified in the State Water Board's SED are environmental impacts that are directly related to a policy in the Delta Plan and should therefore be included in the R-DPEIR. The impacts and analysis found in the State Water Board's SED constitute "significant new information" which influences impact analysis for the Revised Project because the Delta Plan sets a regulatory policy requiring that flow objectives be revised. The public must be informed of this significant new information.

C. Economic and social impacts should be included.

The R-DPEIR repeatedly reminds the reader that impacts will be greater in the Revised Project because it applies to upstream areas of the Delta unlike the Proposed Project. The application of the Revised Project upstream of the Delta, albeit without authority of the DSC to so act, is a reduction of water used from the Delta watershed. This will likely cause an impact on communities that rely on that water, and have no other source from which to obtain water.

"Economic or social effects of a project may be used to determine the significance of physical changes caused by the project." (Cal. Code Regs, tit. 14, § 15131(b).) The DSC should therefore revise the DPEIR to include an analysis of economic and social effects which would result from a net reduction in the percentage of water used from the Delta watershed.

D. The R-DPEIR improperly defers analysis to a later DEIR or negative declaration.

Similar to the DPEIR, the R-DPEIR defers much, if not all, analysis to later environmental documents and analysis, or negative declarations. To justify this, the R-DPEIR several times echoes the DPEIR by stating that it is a "programmatic" document. However, tiering cannot be used for the purpose of deferring environmental analyses to later projects to avoid adequate analyses of environmental impacts of the broader project. (Cal. Code Regs., tit. 14, § 15152(b), (c).) Like the DPEIR, the R-DPEIR improperly defers nearly all impact analyses to other agencies; there is simply no foundational environmental impact analyses from which an agency could later tier from.

Even if the DPEIR and R-DPEIR were acceptable programmatic documents, "CEQA's demand for meaningful information 'is not satisfied by simply stating information will be provided in the future.'" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431, citing *Santa Clarita Org. for Planning the Env't v. Cty. of Los Angeles* (2003) 106 Cal.App. 4th 715, 723.) CEQA requires informative impact analysis from which the public can meaningfully comment.

The R-DPEIR is seriously deficient in much the same way as the DPEIR. Until these deficiencies and those addressed in earlier comments, attached hereto, are addressed, remedied and recirculated, neither

the DPEIR or the R-DPEIR satisfy CEQA requirements. As such, the SJTA requests that the DSC revise the DPEIR and R-DPEIR, and recirculate a single document detailing the impacts and mitigation analysis resulting from the Final Draft Delta Plan.

Very truly yours,

O'LAUGHLIN & PARIS LLP



TIM O'LAUGHLIN

TO/tb

Enclosure

cc: San Joaquin Tributaries Authority



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SENT VIA E-MAIL

February 2, 2012

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RE: Comments of the San Joaquin River Group Authority on the
Delta Plan Draft Environmental Impact Report

Dear Councilmembers:

Thank you for the opportunity to comment on the *Delta Plan Draft Environmental Impact Report* ("DEIR"). The following comments on the Delta Plan ("Plan") DEIR are submitted on behalf of the San Joaquin River Group Authority ("SJRG") and each of its individual members¹ for your consideration. After review and consideration of the DEIR, the SJRG and its members urge the Council to reject it because it does not comply with the California Environmental Quality Act ("CEQA") for several reasons.

A. *The DEIR Project and Alternative descriptions and analyses are inadequate and contain improper conclusory statements, precluding meaningful public review.*

"An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences." (Cal. Code Regs., tit. 14 § 15151; Pub. Res. Code § 21061.) Conversely, the DEIR does not define several key definitions, it makes conclusory statements, and analysis of potential impacts from encouraged actions and alternatives is absent in many sections.

CEQA requires that an EIR provide accurate and sufficient information to allow the public to understand and meaningfully consider environmental issues raised by a proposed project such as the

¹ Modesto Irrigation District, Turlock Irrigation District, Merced Irrigation District, South San Joaquin Irrigation District, Oakdale Irrigation District, Friant Water Authority, San Joaquin River Exchange Contractors, and the City and County of San Francisco.

Plan. (*Laurel Heights Improvement Ass'n v. Regents of University of California* (1988) 47 Cal.3d 376, 405 ["An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project."]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655 ["An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. [citation omitted] ... Only through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives."].)

Several crucial terms and phrases are left undefined in this DEIR, leaving true environmental implications resulting from the proposed Plan undeterminable. For instance, the DEIR provides the statutory definition of "covered actions" in Section 2A (pp. 2A-2 – 4), but follows with a qualification that underlying agency actions, otherwise statutorily exempt, are in fact "covered actions" without further description. This simply confuses the otherwise plain statutory language and casts uncertainty as to the reach of covered actions beyond the Delta, and which actions would be considered "mandatory policy" or merely a "recommendation." (DEIR, p. 2A-5.)

Additionally, "natural flow regime" is not defined in the Project Description or elsewhere throughout the DEIR and yet it is a foundational element of the Plan, especially with respect to the "Delta Ecosystem Restoration" element. (*See, e.g.*, pp. 3-85, 4-68, 6-50.) It is uncertain how much water would be necessary to "make up" for reductions in water as a result of a more "natural flow regime." (*See, e.g.*, pp. 3-84, 85.) Without knowing what is considered "natural flow" it is impossible to analyze any impacts resulting from restoration of "natural flow" and understand why establishment of a "natural flow regime" is preferable to any alternative.

Also, "Delta water" is used throughout the entire DEIR but is undefined as to whether it refers to water upstream of the Delta, water exported from the Delta, water used within the Delta, some combination thereof, or other definition altogether. It is thus also ambiguous who "water users that use Delta water" (or similar) might be. "Delta water" and "water users that use Delta water" as undefined is particularly troublesome because parties and entities cannot know what, if any, responsibility might be derived. In short, the scope of impacts to undefined water users cannot be known and analyzed by the public and interested parties.

This is principally important because the DEIR places the responsibility of investigating, researching and conducting environmental analysis on "local and regional" water suppliers to "make up for [the] reduction in water" the DEIR anticipates. (*See, e.g.*, DEIR, p. 3-85.) One of the specific "Thresholds of Significance" states that the DEIR considers an impact significant if it "[s]ubstantially change[s] water supply availability to water users located outside of the Delta that use Delta water." (DEIR, p. 3-77.) Are the public and interested parties supposed to understand "Delta water" to mean water prior to entering the Delta, while it is within the geographic perimeter of the Delta, or after it flows through and out of the Delta? Clarifying such vagueness is essential to truly understand environmental impacts of the Plan.

Meaningful comprehension and analysis is practically impossible with such vague terms and phrases at work. For example, Impact 3-3a reads in its entirety:

“The Proposed Project encourages a variety of actions to improve local and regional water reliability while reducing the use of Delta water, including actions to increase the use of recycled wastewater and stormwater, groundwater and surface water facilities, surface water and wellhead treatment facilities, water use efficiency and conservation actions, water transfers, and ocean desalination plants. Such water supply reliability projects would provide a benefit to water supply availability to water users that use Delta Water.” (DEIR, p. 3-82.)

The DEIR does not analyze potential impacts of the suggested “variety of actions” and in conclusory fashion determines the variety of projects would provide a benefit. The DEIR does not explain how reducing the use of Delta water will increase reliability, and it does not quantify how much water it will take for suggested actions to make up for the Delta water reduction because no metric is given. Indeed, no metrics are provided in this section or elsewhere in the DEIR.² Such a conclusory nature of the DEIR renders it inadequate. (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336 [Court held FEIR inadequate because of ambiguous alternative analysis.]; *Santiago Cty. Water Dist. v. Cty. of Orange* (1981) 118 Cal.App.3d 818, 831 [“The EIR must contain facts and analysis, not just the bare conclusions of a public agency.”].)

The DEIR also states that the Plan’s primary objective is to achieve the coequal goals in a manner that, among other things, is accomplished as rapidly as *realistically* possible. (See, e.g., DEIR, p. ES-3 (emphasis added).) The DEIR does not state how “accomplishment” is measured and does not discuss the *realistic* nature of the Plan and the Alternatives.

For example, the Plan sets deadlines of years 2014 and 2018 for the State Water Resources Control Board (“SWRCB”) to complete flow objectives and criteria, notwithstanding the lack of authority to enforce SWRCB action. These deadlines have been seriously questioned as unrealistic at several DSC meetings, yet the DEIR assumes these are realistic measures and misrepresents the feasibility of their achievement.

The DEIR, though, uses the non-accomplishment of flow objectives and criteria in an expedient manner as the basis to declare Alternatives 1a and 1b environmentally inferior because those Alternatives “would be less aggressive in moving toward minimum standards for water flow in the Delta necessary for a healthy fishery and ecosystem.” (DEIR, p. 25-11.) Furthermore, despite such reliance on flow criteria and objectives, the DEIR does not describe or analyze why the standards are necessary and, more importantly, how realistic they are and what impacts will result should they not be accomplished.

“To sum up, the omission of required information constitutes a failure to proceed in the manner required by law where it precludes informed decision-making by the agency or informed participation by the public.” (*California Native Plant Society v. City of Santa Cruz*, *supra*, 177 Cal.App.4th at p. 987.) The public and interested parties must better understand what impact, if any, will be felt as a result of the Plan; the DEIR does not provide the required information or analysis, and without both, the public and interested parties cannot reasonably be expected to understand and meaningfully consider issues raised by the Plan. (*California Native Plant Society v. City of Santa Cruz* (2009) 177

² For instance, the DEIR project description states that the DEIR “assumes the Delta Plan will be successful and lead to other agencies taking physical actions.” (DEIR, p. ES-2, fn. 3.) The DEIR, though, neither defines what constitutes success nor provides a metric to measure success.

Cal.App. 4th 957; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App. 4th 1184.)

B. Mitigation measures could result in unconsidered impacts.

The DEIR found that mitigation measures for Change in Water Supply Availability to Water Users that Use Delta Water (Impact 3-3) are not necessary because it assumes that water users will undertake projects to “make up” for water reduction resulting from the SWRCB’s flow objectives. (*See, e.g.,* DEIR, p. 3-84 – 85.) What the DEIR does not at all discuss is the environmental impacts of the “water user” projects needed to make up water.

“If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure *shall be discussed* but in less detail than the significant effects of the project as proposed.” (Cal. Code Regs., tit. 14, § 15126.4(a)(1)(D); *see also Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986 [The appellate court affirmed the EIR did not properly analyze impacts of a mitigation measure which would extend an existing street.])

The DEIR analysis for Reliable Water Supply found that the Plan proposes to reduce the use of Delta water, but the reduction will be offset by the variety of actions the Plan proposes. The DEIR did not make an explicit finding of impact (significant, less than significant, or otherwise). It can be inferred, though, that the “variety of actions” proposed to offset and “provide a benefit to water supply availability” are themselves mitigation measures because the actions are used to reach the conclusion that water supply availability will benefit from implementing these projects. (DEIR, p. 3-82.) The DEIR did not analyze impacts from these actions individually or in the aggregate as a mitigation measure. In effect the Plan and Project Description are incomplete in the sense that it would appear that the speculated mitigations are integral to the Plan’s success.

As to Ecosystem Restoration, the DEIR recognized that water supply availability would be reduced for agricultural, municipal, and industrial water uses because the assumed flow objectives seek to return to a “natural flow regime.” The DEIR, though, concludes this impact is less than significant because “water users would undertake the projects and actions encouraged by the [Plan] to improve water supply reliability, as discussed in Section 2A, Proposed Project and Alternatives, and summarized in Section 3.4.3.1.” (DEIR, p. 3-85) In other words, the DEIR assumes that water users will conceive solutions (such as the “variety of projects”) to mitigate the reduced water supply availability. The DEIR does not analyze impacts that would arise from these mitigation measures.

C. The DEIR lacks analysis and reasoning for dependence on projects unrelated to the Delta Plan as examples of potential environmental effects.

While CEQA discourages duplicative analysis, this DEIR goes too far by entirely avoiding analysis. The DEIR relies on multiple EIRs for wholly unrelated projects. This DEIR assumes that similar impacts would occur if or when “similar” projects are completed as encouraged by the Plan. The DEIR concludes that mitigation measures would be the same to reduce impacts to less than significant in most cases.

For example, the DEIR frequently relied on the Davis-Woodland Water Supply Project EIR to identify potential impacts and related mitigation measures to reduce impacts to less than significant. The DEIR does not explain its reasoning, does not identify similarities of the Davis-Woodland project to the Plan, and/or how environmental impacts and mitigation measures could be—or would be—similar. Ironically, this particular project (that the DEIR heavily relies on) is meeting significant resistance and its fruition is threatened because of the substantial burden placed on ratepayers.³

The core purpose of CEQA is to “inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities.” (Cal. Code Regs., tit. 14, § 15002(a)(1).) Relying on projects in different geographic locations for different objectives creates suspicion that the DEIR does not analyze the true impacts from the Plan. It is as though the Plan DEIR is tiering off of unrelated project EIRs.

While a lead agency can use an EIR from an earlier project, the earlier EIR must have been prepared “in connection with an earlier project to apply to a later project, if the circumstances of the projects are essentially the same.” (Cal. Code Regs., tit. 14, § 15153(a).) The projects and EIRs this DEIR relies upon are entirely unrelated and the DEIR does not identify similar circumstances, geographic conditions or otherwise to make the projects “essentially the same.” Tiering from other and unrelated project EIRs is therefore improper.

D. The DEIR improperly defers analysis to a later DEIR or negative declaration.

This DEIR is a program-level EIR and it anticipates that agencies will prepare separate environmental documents as they propose specific projects encouraged by the Plan, however EIRs cannot simply defer *all* analysis to a later environmental document.

Tiering is a method CEQA allows to analyze general matters in a broader EIR to eliminate repetitive environmental analyses. (Cal. Code Regs., tit. 14, § 15152.) Tiering, though, cannot be used for the purpose of deferring environmental analyses to later more specific projects and avoid adequate analyses of environmental impacts of the broader project. (Cal. Code Regs., tit. 14, § 15152(b), (c).) Here, the DEIR defers virtually all environmental impact analyses to other agencies encouraged to implement projects suggested in the Plan. No environmental analysis is available in this DEIR that an agency can later tier from. In fact, *this* DEIR is essentially seeking to improperly tier from other wholly unrelated EIRs. This DEIR is seeking to approve a Plan, but defer any analysis whatsoever of environmental impacts to later DEIRs; in essence, this DEIR is “putting the cart before the horse.” (*Stanislaus Nat’l Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 200.)

E. The DEIR is encyclopedic rather than analytic and excessively long.

CEQA requires that EIRs, among other things, (i.) are prepared in a clear and plain language format, (ii.) are analytical rather than encyclopedic, (iii.) are meaningful to the public, and (iv.) emphasize alternatives and feasible mitigation measures rather than unnecessary project description. (Cal. Code Regs., tit. 14 §§ 15000 et seq., Pub. Res. Code § 21003.) The DEIR fails to accomplish any of these.

³ See, e.g., <http://www.sacbee.com/2012/01/30/v-print/4224312/water-systems-need-fixes-badly.html>

The DEIR is approximately 2200 pages, far exceeding the recommended number of pages: 150 pages, 300 in unusual circumstances.⁴ (Cal. Code Regs., tit. 14, § 15141.) This creates a considerable burden for interested parties and the general public in sorting through the DEIR to find worthwhile analyses to comment on, frustrating the very purpose of EIR review.⁵

CONCLUSION

Commenting on the DEIR is a daunting task because it does not analyze an actual project and the sheer volume made it nearly impossible to cite each inadequacy. The above analyses and citations are examples and not intended as exhaustive of each inadequacy. The public and interested parties require much more analysis of environmental impacts before this DEIR can be meaningfully reviewed and deemed sufficient.

Very truly yours,
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VALÉRIE C. KINCAID

VCK/tlb
cc: San Joaquin River Group Authority

⁴ Additionally, the Executive Summary "should not normally exceed 15 pages," yet the Executive Summary to the DEIR is 57 pages. (Cal. Code Regs., tit. 14, § 15123(c).)

⁵ "The purposes of review of EIRs ... include: (a) Sharing expertise, (b) Disclosing agency analyses, (c) Checking for accuracy, (d) Detecting omissions, (e) Discovering public concerns, and (f) Soliciting counter proposals." (Cal. Code Regs., tit. 14, § 15200.)